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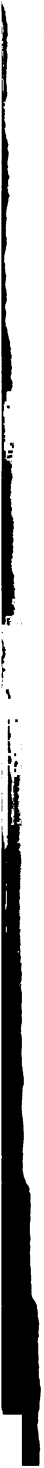


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A MONOGRAPH
ON
LEGAL ETHICS.

ADDRESS
TO THE
TEXAS BAR ASSOCIATION

BY
JOHN CHARLES HARRIS
OF THE
HARRIS COUNTY BAR.

A. D. 1907.

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12 July, 1907.

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LEGAL ETHICS.

Twenty-five centuries ago, as the sun rose from out the desert beyond the Dead Sea, its rays fell upon the gilded dome of the Temple at Jerusalem, where a multitude of Priests in their gorgeous robes were conducting an elaborate ritual in what was perhaps the most ornate temple ever erected to the one true God. Ecclesiastical processions were marching hither and yon, and the air was perfumed from a myriad censers; thousands of rams and bullocks were being sacrificed and rivers of oil were being poured out in elaborate ceremonies to propitiate the Almighty.

And the morning rays of the same sun also lighted up that great prophet of the people, Micah, in the desert; and as Micah beheld the temple, and the army of priests with their thousand and one precepts and rules regulating in every minute particular the daily lives and habits of the people, Micah was inspired by the spirit of the living God, and he cried out: **“What doth the Lord require of thee, but to do justly and to love mercy.”**

The words of Micah fell on ears that hear not; and his voice was silenced by death; and for five hundred years the dust of his bones had been mingled with the sands of the desert, when another prophet, mightier than Micah, lifted up his voice in the same land, and in the same desert; and beholding the same temple and the priests and the

sacrifices and the people contending with the same thousand and one "thou shalt" and "thou shalt not," this Son of the Most High spoke to the people, saying:

"Treat others as you like them to treat you."

And in these two rules we have a complete code of Legal Ethics; that is, a complete moral code in the practice of law, for the word legal comes from the Latin *lex, legis*, a law; and the word ethics is derived from the Greek *ethikos*, meaning of or relating to morals; so that legal ethics may be defined as the moral code applied to the practice of law; and this might be summed up in its entirety as follows:

FIRST.

Do justly and love mercy.

SECOND.

Treat others as you like them to treat you.

And here this address might well close; yet it may, perhaps, be instructive to apply the above maxims to some cases arising in our daily practice.

But before making an application of the rule to do justly and love mercy, it might not be inappropriate to consider the precise meaning of the command: Justly is from the Latin, *justus*, meaning right or justice; and is defined as conforming to rectitude or justice; not violating right or obligation; upright, righteous, honest, true. So that to do justly is to act conformably to rectitude; to so act as not to violate any right or obligation; to be upright; to be righteous; to be honest; to be true and truthful.

Mercy is an abbreviated French form of the Latin *miseri-cordia*, which means having a heart to pity; and is defined as compassionate toward an offender or adversary; willing to spare and to help.

The Golden Rule: To treat others as you like them to treat you, is simplicity simplified, and an axiom reduced to its lowest terms.

And bearing these definitions in mind it will not be amiss to apply the above rules to concrete cases:

Let us suppose that one of the leading citizens of the county has murdered another citizen, by shooting the victim in the back, when he is unarmed and as he is attempting to escape. The assassin, who is one of the richest men in the county, does not desire to pay the penalty of his offense, and be hung. He comes to your office and offers you a retainer of \$10,000 to acquit him. You naturally inquire what is his defense, and he replies, insanity; or, perhaps, he answers, self-defense.

You know that the man is not insane, but you also know that your client is rich enough to hire learned doctors of medicine, who will testify in medical jargon that the murderer is a paranoiac, and is suffering from paralytica dementia and arthritic, cyclic, homochronus, homologus and ideophrenic insanity; again, you know that he did not commit murder in self-defense, because his victim was unarmed and attempting to escape at the time he was shot in the back, and you further know that your client is rich enough and powerful enough to produce witnesses who will swear that the deceased was a man of most violent temper, very dangerous, and had made threats to kill your

client on sight; and all considered, it is quite evident you can get a verdict of acquittal and earn \$10,000.

As a matter of legal ethics are you justified in taking the case, accepting the \$10,000 cash retainer, and setting up the defense of insanity or self-defense, or both, when **you know they are both false** as a matter of fact.

By the first rule you are obliged to act justly, that is, you must be honest; you must be true; you must do right.

Is it honest to knowingly set up a false defense in this case? No.

Is it right or honest or true, to set up the false pleas of insanity or self-defense in this case? No.

Then you are obliged to refuse the \$10,000 cash retainer and to decline the employment.

But are you justified in accepting the cash retainer and setting up SUCH defense as you believe to be honest; to be just; to be true?

Certainly you are, but your criminal practice is apt to be extremely limited.

What defense, then, is a criminal lawyer justified in making. The answer is, every defense which is just; honest; true, and right.

The very foundation of our system of jurisprudence and government is **justice according to law**, and that is what the criminal is entitled to have, justice according to law; for it is better that nine guilty men should escape than that one innocent man should be unjustly punished; and the criminal lawyer has a right to demand that the entire truth shall be presented in the facts, and that after this has been done, his client, if convicted at all,

shall be convicted according to law; and here it might be well to remark that the law is just as much enforced under a judgment of acquittal as under a judgment of conviction.

Let us take another concrete example, and this time from the civil practice of the law.

Let us suppose that the richest man in the county has loaned another citizen money and taken a mortgage upon all the goods and chattels and hereditaments and appurtenances and choses in action and franchises and things tangible and rights intangible, and, in fact, a mortgage upon everything except the man's soul; and that the debtor has had great misfortune and sickness and trouble, and is temporarily unable to pay; and that the rich man, whose friendship and favor and patronage is valuable to you, a lawyer, comes into your office and demands that the debtor be pursued in terms of the law; that the mortgage lien be foreclosed; that the debtor's property be forced upon the market, purchased by the creditor for one-tenth of its actual value, the amount of the execution sale be credited on the debt, and judgment held over the debtor for the balance remaining unpaid, although at a fair valuation the mortgaged property is double the amount in value of the debt; and the rich man tenders you \$1,000 as a cash retainer to do this act.

What does the code of legal ethics require? Shall you accept the retainer and keep the patronage and favor of the rich man, or shall you return the retainer, lose all the business which this rich man might give you, and incur his personal enmity and dislike.

Let us apply the two rules given.

Treat others as you like them to treat you. If you were in the debtor's shoes and temporarily embarrassed financially, would you like to have the mortgage lien foreclosed, and your property sacrificed, when by a delay of three months or six months you could pay off the debt and retain your property? You know you would not, and neither would the rich man himself, if he were in the debtor's shoes.

Again, if you would do justly **and** love mercy you cannot be an instrument of oppression in the hands of a rich client; and you will note well that the rule does not read, thou shalt do justly **or** love mercy; but that you must do both things—you must act justly and love mercy.

Now justice according to law would perhaps warrant your filing foreclosure proceedings and absolutely sacrificing the property of the debtor; but the rub is, that you must also love mercy; and mercy is the quality of being compassionate toward an offender or adversary, and willing to spare or help him; and, therefore, under the rules you must decline the \$1,000 retainér and refuse to take the case.

But must no debtor be pursued according to law, and must no debt be paid? Certainly, the debt must be paid, for the debtor also is required to act justly, and to treat others as he would like them to treat him; and it suffices to say that as these rules apply to every case, so each man according to his own conscience must fit the rules to each individual case as it arises; nor must any other man assume to sit in judgment upon him, for he alone

and no other is responsible for his own actions, in the day of judgment.

What is the duty of the lawyer in regard to abetting quarrels and provoking litigation? For instance, I will suppose that you are consulted by a husband who has plenty of money to spend in litigation and would like to get rid of his old wife and marry a new and younger one; in a case like this a client is apt to feel that he will not permit money to stand in the way of his wishes. You consult with your client carefully and ascertain as a matter of fact that he has no statutory ground for divorce; however, the client insists upon your bringing suit and says that he will furnish the evidence himself, although you know from your confidential relation to your client that this evidence must necessarily be manufactured. What is the duty of the lawyer in such a contingency? Well, he must treat others as he would like them to treat him; and in this particular event he might treat, in his mind, the wife of the client as though she were his own daughter. Again, the lawyer is required to act justly, and this means to be honest; to do right; and this train of reasoning would compel the lawyer to decline the employment; and generally in all cases where the client seems to be desirous of bringing unjust law suits, or to be malicious or anxious for revenge, it would appear to be the duty of the honest lawyer to decline employment in such litigation.

Again, suppose you are consulted by a client who is rich and well able to pay; and upon discussing the case with him you feel that your client is entirely wrong and that if he brings suit he will undoubtedly lose. Should you can-

didly and honestly tell your client what you believe, or should you assure him that the law is proverbially uncertain, that he will as likely as not win, and that he ought to litigate. In this case you have to consider that you must act justly, and that means honestly and truthfully; and it would appear that in all such consultations you must frankly and fully advise your client that to the best of your judgment and ability he has no case.

Let us suppose as another example that you have just collected \$5,000 for a non-resident client, who is spending three months abroad; on the day that the collection is made you can remit the \$5,000 in New York exchange to your client's home office, and the same will be deposited to his credit; on the other hand, your client knows nothing of the collection, and as he is abroad, is not likely to know anything about it until he returns, three months from then; and in your judgment the wheat market or the cotton market is bound to advance in price; so that by investing temporarily the \$5,000 of your client, you feel quite sure you can make \$10,000, and when your client comes back you can remit him his \$5,000, and you can have \$5,000 to your own credit, without having done your client any harm.

Query. Are you justified in using your client's money in this way, when you make \$5,000 by the transaction and your client is done no injury.

Would you like some friend of yours to collect \$5,000 of your money and then, without your consent, invest it in cotton futures or wheat futures. You know you would not. Then you cannot use your client's money, for you

must treat him as you would like him to treat you; and then, besides, you might lose, because the market might not advance but might accidentally decline; and then, perhaps you would not be able to return the \$5,000 of your client's money; and if you could not repay him that would not be honest; and by the rule you are required to do justly, that is, to be honest.

And from the above example we may deduce the general rule that money collected on account of a client should be remitted to that client on the day of collection.

Another case. Let us suppose that you have been consulted for years by a client who has, naturally, confided to you his most confidential business affairs, and has consulted you both in your office and on the public highway; when you had a specific retainer and when you had no specific retainer; sometimes consulting you as a lawyer and sometimes merely as a friend and confidential adviser.

You finally fall out with this client, and he retains other counsel; and you quite naturally think that your client is entirely in the wrong. Finally, you are retained against your former client in a case where your personal knowledge, obtained when your former client was your friend, would be of great advantage in the pending suit.

Query. Are you justified in any way in acting upon such private information and personal confidence, to the injury or disadvantage of your former client?

Again apply the rule: Treat others as you like them to treat you. Would you like a person in whom you at one time had reposed confidence to betray that confidence, because you had quarreled? You know you would not.

Again, you are required to do justly; and that is to be honest; to be true. Is it honest to betray a confidence because you have a private grievance? Is it being true to a friend to betray private confidences, because you have later quarreled with him?

Tested by these rules you will see that whatever may happen, you cannot betray the confidences that were reposed in you as a lawyer, no matter how you may try to silence and quiet your own accusing conscience by specious reasoning.

Consider that you are consulted by a client, who has about half a million dollars of assets and about one million dollars of liabilities, which are just obligations. Some day this client consults you and tells you that while he appears to be a very rich man, yet his liabilities are twice his assets; that he is now getting along in years, and that he believes that his first duty is to his wife and to his children; and that he considers the duty he owes to them, to support them in the luxury and style to which they have been accustomed, is superior to the duty which he owes to pay his honest debts; and this client suggests to you, that if out of the wreck you can save \$200,000, you can have \$100,000, and he will take the remaining \$100,000 for the support of himself and his family in his declining years.

Are you justified in accepting this case and assisting your client to deceive his creditors as to the true state of his affairs, by fraudulently conveying the property of the client to his relatives, kinsmen and friends; by converting personal property into ready cash and concealing

the cash; by permitting your client to make false statements to the bankrupt court; and, generally, by devious ways and means forcing the creditors to accept thirty cents on the dollar in full of all obligations, because out of the \$500,000 of assets you have succeeded in concealing \$200,000, thus leaving only \$300,000 to pay \$1,000,000 of liabilities.

Are you justified in assisting your client in this manner, when personally you make no false statements, and merely obey the instructions of your client.

Well, let us apply the rules. You are required to act justly, not only toward your client, but toward the creditors; that is, you are required to be honest; to be upright; to be true, toward the creditors as well as toward your client.

Again, you are required to treat others as you would like them to treat you. If you were a creditor would you like some lawyer to treat you as you propose to treat the creditors. If you were a creditor, would you consider that such a lawyer was upright and true? Would you consider that such a lawyer was acting justly and honestly? The answers to these questions will answer the suppositional case, and will indicate that no lawyer can be a party to such a transaction.

Let us discuss the lawyer at the bar of the court by a consideration of certain specific cases. The statute law requires that when a lawyer files a motion, it shall be noted on the motion docket and that all parties connected with the case must take notice thereof.

Let us suppose you have filed your motion and at the

same time it has been noted on the motion docket, that the matter is one of importance, and that when the motion is called your adversary is not present to be heard, because you never have furnished him with any copy of the motion and never have notified him in any manner that you have filed the motion, or that you will call the same up for hearing.

Are you justified in going ahead and submitting the motion. Let us test this matter by an application of the rules.

You are required to act justly, and as you have complied with the statute law, we will assume that in strict justice, you may proceed with the motion; but before you proceed the question must be further tested. You are not only required to do justly, but you are just as much required to love mercy; and mercy is defined as compassion toward an adversary and a willingness to spare and help, from which it would appear that you cannot go on with the hearing of the motion.

And you are also required to treat others as you like them to treat you; and no one would be more indignant than you, should your adversary proceed to hear a motion, without giving you some personal notice. It thus again appears that you cannot go on with the motion.

Some fine morning you go into the court room with your client and witnesses all ready to try your case; you have already carefully gone over the jury panel and have decided that it is a very favorable panel for this particular suit; but when the case is called for trial, although two members of the opposing law firm are present in court, it appears that the particular member of the firm who has

prepared this case, and is the only member of the firm at all familiar with either the law or the facts, is sick at home, and cannot personally conduct the cause; or it appears that his wife is so dangerously ill that he does not feel that he can leave her bedside; or that his mind is so distracted by the serious illness of a child, that he does not feel that he can properly try the case. Upon all these facts being presented to your client he insists that you try the case now, because he sees clearly that with a favorable jury panel and in the absence of the one lawyer on the other side who knows anything about the case, he will surely win.

What is your duty upon the above state of facts?

You are required to act justly toward your client, but you are also required to love mercy, that is, to show compassion toward your adversary; and you are also equally obligated to treat your adversary lawyer as you would like him to treat you, from which considerations it appears that if you would not like your adversary to proceed against you in a similar case, you cannot now proceed against your opponent; and if you would not like your client to be proceeded against in a similar case, you must not now proceed against your adversary; and you must never think that you can successfully throw off upon your client the responsibility of your own mean action and escape the odium thereof.

Let us assume as another example that you are arguing a general demurrer in a case involving \$30,000, and that you know there is a long line of authorities supporting your contention; but suppose you know, on the other

hand, that there is one authority by a very eminent court absolutely adverse to your position; you have made a long argument and have presented all your authorities to the trial judge who, apparently, is very much inclined to hold against you. In your argument you have said nothing about the adverse decision by one of the most learned courts in the land. You sit down. Your opponent attempts to answer you, but in his argument utterly fails to cite the strongest case in his favor. At the conclusion of your address the court turns to you and inquires if you know of any case or cases which conflict with the law as stated by you in your opening argument.

Query. What is your duty to the court, as a sworn officer of that court.

By the rules you are required to act justly toward the court; to be honest with the court; to be upright with the court; and you are required to treat the court as you would like the court to treat you, if your positions were reversed, and you were attempting to do justice according to law. In view of these rules it would appear that you are compelled to advise the court of the adverse decision, although your client should thereby lose his suit.

With regard to the elemental consideration of courtesy and politeness toward the court, toward opposing counsel, opposing witnesses, and the adverse party: You have but to apply the rule, to treat others as you would like them to treat you; and as this world is much like a looking glass, the chances are that if you treat them as you would like them to treat you, they will treat you as you would like to be treated.

But what about the lawyer doing his full duty by his client. Well, this may be said about that proposition: That the oath of office, taken by a lawyer in Texas, is that **he will honestly demean himself in the practice of law, and will discharge his duty to his client to the best of his ability,** but it is a great mistake to suppose that the lawyer owes no fidelity to any one except his client; and no lawyer ought to represent any client in any case in a matter which is contrary to the dictates of his own conscience; for if he honestly demeans himself in the practice of the law, then he must be honest, not only with his client, but with the court, with the jury, with the witnesses; with the lawyer opposed to him, and with the adversary party; for there is no limit in the oath which he takes when he is admitted to the bar; and this oath that he will demean himself honestly in the practice of the law means no more, than the command of Micah to do justly.

It will not be contended, I think, that a lawyer's fidelity to his client demands that he lie for his client, or steal for his client, or swindle for his client, or prepare fraudulent papers for his client, or make false statements of either the facts or the law for his client.

In my view of the profession of the law, the lawyer is not a hired mercenary; nor a hired blackguard; nor a hired vilifier of the other side; but rather he is to be compared to the noble knights of the Middle Ages, who were professional warriors in the interest of truth and justice; who donned their armor and fought their battles, after due notice, in the open; their oath was to conquer

or die on the field of honor, but they were to conquer in a fair and open fight.

Again, the lawyer may be looked upon as a professional duellist, who sends a challenge to his enemy, naming the time and place of the meeting, and with courtesy and courage defeats his adversary in an open, fair conflict, if he can.

It is not an open, fair fight that offends against legal ethics, for the hard fighter at the bar is always respected by his brethren; but the lawyer who is justly condemned is the one who appoints a time and place for the contest, and then secretly ambushes and waylays his adversary in the dark and stabs him in the back.

I have given only a few instances to show the application of the rules, where ten thousand instances might be given, and will continually occur in the practice of the law.

As to the rules which I have cited as forming the whole basis of legal ethics, **I know that these rules are absolutely right.**

As to the application I have made of the rules, I may be entirely wrong; and every lawyer must apply the rules according to his own judgment, as he alone is responsible for his own actions in the forum of conscience.

JOHN CHARLES HARRIS.

E. C. B. 12 July 07.

